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Kuljeet Singh a/l Kulwant Singh v Public Prosecutor

B HIGH COURT (GEORGETOWN) — CRIMINAL TRIAL NO PA-42S-9–05 OF 2019
AKHTAR TAHIR J
3 DECEMBER 2019

C *Criminal Procedure — Appeal — Appeal against conviction and sentence — Accused sentenced by sessions court to jail and whipping for possession of dangerous drugs — Whether appellate court could not interfere with findings of facts made by trial court in finding accused guilty because it had audio-visual advantage of seeing and hearing the witnesses and determining veracity of their*
D *evidence — Whether sentence imposed by trial court should not be disturbed as trial judge had given good reasons for imposing same — Whether sentence should only be disturbed if it was illegal or manifestly inadequate*

The sessions court sentenced the appellant to ten years' jail and 12 strokes of
E the rotan after finding him guilty of possession of 6.3g of heroin and monoacetylmorphine, an offence under s 12(2) of the Dangerous Drugs Act 1952. Two sessions court judges had presided over the appellant's trial at different times — the first judge had found that the prosecution had proven a prima facie case against the appellant; thereafter, the second judge had heard
F the appellant's defence and convicted him at the end of the trial. In his instant appeal, the appellant contended that both the judges were wrong in coming to their respective decisions. According to the prosecution's case, the appellant was arrested in front of the guardhouse of a condominium when the drugs were found in the basket of his motorcycle. The appellant denied knowledge of the
G drugs. The sessions court judges believed the prosecution's witnesses and found the appellant's defence to be an afterthought and the testimonies of his mother and friends to be of little value as they were not present when the offence was committed and could not corroborate his testimony.

H **Held**, dismissing the appeal and affirming the conviction and sentence:

(1) The evidence adduced in the court below supported the decisions of both the sessions court judges who came to a firm finding of facts. An appellate court should be slow in disturbing such finding of facts as the trial judges
I had had the benefit of assessing the demeanour of the witnesses who testified before them and were in a better position to determine the veracity of the evidence given (see paras 14–15).

(2) Both the sessions court judges had given due consideration to all the evidence which clearly showed that the prosecution had proven its case

beyond reasonable doubt. There was no reason for disturbing the sentence against the appellant as the trial court had given its reasons for imposing the same. An appellate court should not interfere with the sentence passed by the trial court unless it was illegal or manifestly inadequate (see paras 17–18 & 20–21).

[Bahasa Malaysia summary

Mahkamah sesyen menjatuhkan hukuman sepuluh tahun penjara dan 12 sebatan rotan terhadap perayu selepas mendapati beliau bersalah memiliki 6.3g heroin dan monoacetylmorphine, satu kesalahan di bawah s 12(2) Akta Dadah Berbahaya 1952. Dua hakim mahkamah sesyen telah mendengar perbicaraan perayu pada masa yang berbeza — hakim pertama mendapati bahawa pendakwaan telah membuktikan kes prima facie terhadap perayu; selepas itu, hakim kedua telah mendengar pembelaan perayu dan mensabitkan beliau pada akhir perbicaraan. Dalam rayuan ini, perayu mengujahkan bahawa kedua-dua hakim tersebut telah terkhilad dalam membuat keputusan masing-masing. Berdasarkan kepada kes pendakwaan, perayu telah ditahan di hadapan pondok pengawal sebuah kondominium apabila dadah tersebut telah ditemui dalam bakul motosikal beliau. Perayu menafikan pengetahuan mengenai dadah tersebut. Hakim-hakim mahkamah sesyen mempercayai saksi-saksi pendakwaan dan mendapati bahawa pembelaan perayu adalah suatu pemikiran semula dan keterangan ibu dan sahabat beliau menjadi tidak bernilai kerana mereka tidak berada ketika kesalahan itu dilakukan dan tidak dapat menguatkan keterengan mereka.

Diputuskan, menolak rayuan dan mengekalkan sabitan dan hukuman:

(1) Keterangan yang dikemukakan di mahkamah bawahan menyokong keputusan kedua-dua hakim sesyen yang mebuat dapatan terhadap fakta. Mahkamah rayuan sepatutnya keberatan untuk mengganggu dapatan fakta sedemikian kerana hakim-hakim sesyen telah mendapat manfaat dalam menilai sikap saksi yang memberikan keterangan di hadapan mereka dan berada dalam kedudukan yang lebih baik untuk menentukan kebenaran keterangan yang diberikan (lihat perenggan 14–15).

(2) Kedua-dua hakim sidang hakim telah memberikan pertimbangan yang sewajarnya kepada semua bukti yang jelas menunjukkan bahawa pihak pendakwaan telah membuktikan kesnya melebihi keraguan munasabah. Tidak ada sebab untuk mengganggu hukuman terhadap perayu kerana mahkamah perbicaraan telah memberikan alasannya untuk mengenakan perkara yang sama. Mahkamah rayuan tidak sepatutnya mengganggu hukuman yang diputuskan oleh mahkamah perbicaraan melainkan jika ia menyalahi undang-undang atau tidak jelas (lihat perenggan 17–18 & 20–21).]

Cases referred to

PP v Mohamed Nor & Ors [1985] 2 MLJ 200b; [1985] 1 LNS 25, SC (refd)
PP v Wan Razali Kassim [1970] 2 MLJ 79; [1970] 1 LNS 121, FC (refd)

Gunamalar for the appellant.
Noor Azura Zulkiflee (Deputy Public Prosecutor, Penang State Legal Advisor's Office) for the respondent.

Akhtar Tahir J:

THE CHARGE

> Bahawa kamu pada 18/10/2016 jam lebih kurang 1825 hrs bertempat di Hadapan Pondok Pengawal, Awana Condominium, Lorong Bukit Kukus, Paya Terubong dalam Daerah Timur Laut, dalam Negeri Pulau Pinang telah ada dalam milikan kamu dadah berbahaya iaitu heroin dan monoacetymorphine seberat 6.3 gram dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 12(2) Akta Dadah Berbahaya dan boleh dihukum di bawah Seksyen 39A(2) Akta yang sama.

BRIEF BACKGROUND

[1] The trial of the charge against the accused was heard before two different session judge. The first sessions judge heard the case until the end of the prosecution's case and decided that the prosecution had proven the charge against the accused on a prima facie basis.

[2] The second sessions judge heard the defence and decided at the end of the defence that the accused had failed to raise any reasonable doubt in the case for the prosecution and found the accused guilty of the charge and sentenced him to an imprisonment term of ten years from the date of arrest and 12 strokes of the rotan.

[3] The accused did not raise any issue of prejudice against his case on the reason that two sessions judge had heard the case but rather contended in his petition that both sessions judges had erred in making their respective decision.

THE PROSECUTION'S EVIDENCE

[4] The evidence led by the complainant showed that on 18 October 2016 while carrying out a routine drug surveillance operation noticed the accused acting suspiciously and detained him.

[5] Nothing was found on the accused after a body search was done. The complainant then inspected the motorcycle Honda EX5 bearing the registration number PJX 5705 and from the basket of the motorcycle retrieved

a brown package containing transparent packets of substance believed to be dangerous drugs heroin. There were a total of 100 such packets tied in packets of ten each.

[6] The accused was arrested and the suspected packets of drugs were sent for analysis to the chemist department. The chemist who analysed the contents of the packets confirmed that it contained the dangerous drugs as described in the charge.

THE DEFENSE

[7] The accused gave evidence under oath and called a number of other witnesses. The accused testified that he regularly went to the place of the incident at Awana condominium to use the facilities there.

[8] On the date of the incident he went to the condominium as usual but on reaching the condominium at 6pm he received a call from his mother to return home. Abiding by his mother's request he went to the guardhouse to return home.

[9] On reaching the guardhouse he was detained by a person who carried out a body search on him. Only then the complainant arrived and brought him to the basement of the condominium to an office where he was shown a CCTV footing. He was then brought to the tenth floor of the condominium to a unit occupied by a Chinese lady who he did not know.

[10] At the unit he overheard the complainant say that the thing was found but he himself did not see the thing found. He was then arrested and brought to the police station and was forced to admit that the thing found belonged to him.

THE DECISION OF THE LEARNED SESSIONS JUDGE

[11] The learned sessions judge who heard the case until the end of the prosecution decided that the prosecution had proven the charge against the accused on a prima facie basis and in short believed the testimony of the prosecution witnesses.

[12] The learned sessions judge hearing the defence as an afterthought as matters raised in the defence especially of being brought up to a condominium and finding of a thing by the complainant in the condominium.

[13] The sessions judge also regarded the testimony of the mother and friends of the accused as mere testimonial of his good character but as they were

not present at the scene of the incident they could not corroborate any part of the testimony of the accused on his arrest.

THE DECISION ON APPEAL

[14] On deciding this appeal, the court considered the entire notes of proceedings and also at the grounds of judgment. The evidence adduced supported the decision of both the session judges who had come to a firm finding of fact.

[15] The court hearing an appeal should be slow in disturbing the finding of fact as both the session judges had the benefit of assessing the demeanour of the witnesses who testified before them and were in a better position to determine the veracity of the evidence given.

[16] In *Public Prosecutor v Wan Razali Kassim* [1970] 2 MLJ 79; [1970] 1 LNS 121, the Federal Court ruled:

> There is another point we should mention. The learned judge seemed to be strongly influenced by the fact, as he put it, that the accused had specifically noted the number of the insurance policy in the station diary. It was pointed out to us that that finding made by the learned judge was wrong. The only evidence in reference to this was that of the accused himself who stated 'I copied the number of the insurance policy etc at the back of his statement'. We were referred to exh P6 — the relevant station diary, containing an entry made by the accused in reference to the accident. There is no reference to PW3 or the fact that he was driving a motor cycle without a third party risks insurance. We therefore come to the conclusion that the learned judge on the evidence was wrong in quashing the conviction. An appellate court should be slow to interfere with the finding of fact by a lower court as an appellate court does not have the advantage of seeing and hearing the witnesses and therefore of assessing their credibility. As Lord Diplock had stated in *Tan Chow Soo v Ratna Ammal* [1969] 2 MLJ 49; [1967] 1 LNS 178 at p 50:
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> > An appellate court, particularly where there is no full transcript of the oral evidence, is in a far less advantageous position to decide an issue of credibility than the trial judge who heard the evidence in full and observed the witnesses as they gave it, noting their pauses and their hesitations and any visible signs of confidence or embarrassment.

[17] Both the session judges had given due consideration to the evidence by making a maximum evaluation of the evidence adduced which includes the oral testimony and documentary proof.

[18] The evidence adduced in this case clearly proves all the ingredients of the offence contained in the charge and the prosecution has discharge the

burden of proof at the end of the prosecution's case and beyond reasonable doubt at the end of the whole case.

[19] The court therefore affirms the finding of both the session court judges.

[20] The second sessions judge has also given reasons for imposing the sentence he imposed and the court sees no reason to disturb the sentence.

[21] The Supreme Court in *Public Prosecutor v Mohamed Nor & Ors* [1985] 2 MLJ 200b; [1985] 1 LNS 25, made it clear that appellate courts should be slow to interfere with sentences passed by trial courts unless it was manifestly inadequate or that the sentence was illegal.

> In this regard we would observe that it is the established principle that an appellate court should be slow to interfere or disturb with a sentence passed by the court below unless it is manifestly wrong in the sense of being illegal or of being unsuitable to the proved facts and circumstances. And the mere fact that another court might pass a different sentence provides no reason for the appellate court to interfere if the court below applies the correct principles in the assessment of the sentence.

[22] In the upshot the court dismissed the appeal and confirmed the decision of the trial court on both conviction and sentence.

Appeal dismissed, decision of the trial court on conviction and sentence confirmed.

Reported by Ashok Kumar